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No. 564

In the Supreme Court of the United States

OCTOBER TERM, 1946

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

THE GENERAL INDUSTRIES COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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THE GENERAL INDUSTRIES COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Sixth Circuit entered in the above case on May 28, 1946, and that the judgment be reversed.

OPINIONS BELOW

The opinion of the District Court (R. 137–141) is reported at 60 F. Supp. 549. The opinion of the Circuit Court of Appeals (R. 159–164) is reported at 155 F. 2d 711.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 28, 1946. A petition for re-

hearing was filed on June 17, 1946 (R. 165–174), and denied on July 8, 1946 (R. 176). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The employees in this case received flat monthly salaries under contracts of employment which did not specify regular or hourly rates of pay. One of the employees had always been paid on a salary basis; the others had formerly been paid on an hourly basis. In the negotiations concerning the amount of the salary, consideration was given, *inter alia,* to the hourly rates previously paid. The question is whether the court below was justified in holding, notwithstanding the ruling of this Court in *Overnight Motor Co.* v. *Missel,* 316 U. S. 572, that Section 7 of the Fair Labor Standards Act did not require that the employees receive compensation in addition to their salaries for hours worked in excess of the statutory maximum.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. sec. 201) are as follows:

> SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> * * * * *

> (3) for a workweek longer than forty hours * * *
>
> unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

STATEMENT

Respondent, an Ohio corporation, is engaged in the manufacture of metal and plastic products, substantially all of which are regularly distributed in interstate commerce (R. 141). Respondent generated its own power and employed three operating engineers, in addition to a chief engineer, to man the power plant (R. 137). This petition relates to the three operating engineers whose duties included maintaining the machinery in proper operation by packing, wiping, oiling, making emergency repairs and minor adjustments, reading gauges and listening for sounds of disorder (R. 149). The Administrator's complaint alleged violations of the overtime provisions of the Act with respect to these employees (R. 5–7, 10). Respondent answered that its covered employees who did not receive overtime compensation in accordance with the requirements of the Act were exempt as executive or administrative employees under Section 13 (a) (1) and the Administrator's regulations (R. 20, 23, 102). The Administrator's regulations require an employee to be compensated for his services "on a salary

basis" in order to qualify for exemption as an executive (R. 134). The district court found that the three engineers were employed as executives and therefore exempt from the provisions of the Act (R. 152). On appeal, it was held that the findings underlying this conclusion of the district court were not sustained by the evidence (R. 162). The denial of an injunction was affirmed, however, on the ground that the employees were compensated for overtime employment in accordance with the requirements of the Act (R. 164).

The district court found that all three engineers were "compensated on a salary basis" (R. 145–147). The district court made no finding and the record contains no evidence that the contract of employment specified any regular or overtime hourly rate of pay. The only written agreement in the record, signed by the three engineers on July 25, 1944, makes no reference to any basis of compensation except the monthly salary. It provides (R. 151):

> We the undersigned, choose from henceforth to be regarded as Foremen, as in the past, with Foremen privileges *and continue on a salary basis.* [Italics supplied.]

Respondent's witnesses testified that the employment contracts did not provide a fixed hourly rate because "the company was going on the premise, which we are still going on, that these men were what you call exempt employees, they were super-

visory employees, and that under the law they were not entitled to time and a half" (R. 101).

One of the engineers (Stegman) apparently had always been paid on a salary basis and received no additional compensation for overtime hours (R. 147, 66, 67). The two other engineers (Page and Spooner) had been paid on an hourly basis until February 1941 when they were placed on a monthly salary (R. 145–147, 99, 100, 107). With respect to each of these two engineers, the district court found that at the time of suit he "received no compensation for overtime in addition to his salary" except "straight-time overtime pay for hours worked in excess of 46 hours per week, up to a maximum of 53 hours per week" (R. 145–147).[1] The engineers had a normal workweek of 51 hours, but the hours actually worked sometimes varied from 42 to 59½ (R. 45, 120, 128, Exs. M, N). The straight-time rates were computed by reducing the monthly salary to its weekly equivalent and dividing the weekly wage by 46 (Exs. 3, M, N).[2]

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[1] This arrangement was in effect from December 15, 1943, to December 31, 1944. For the period from June 1, 1943, to December 15, 1943, straight-time overtime was paid for hours worked in excess of 49. Between February 1941 and June 1943 only the salary was paid (R. 145–147). The exhibits referred to are on file with the court.

[2] The monthly salary, $210, multiplied by 12 and divided by 52, is $48.46 per week. This amount, divided by 46, is $1.054 per hour. This rate was paid for five hours each week (the difference between 51 and 46) and for four weeks each month. This explains the monthly entry on appellee's records of $21.08 for overtime.

Prior to the time Page and Spooner were placed on a salary basis, negotiations were conducted to fix the amount of the salary. The district court found that as a result of these negotiations it was agreed "that they would be compensated on a monthly salary basis" in an amount sufficient to provide for the regular and overtime compensation previously paid them at their regular hourly rate of 80 cents per hour (R. 150). The salaries did not purport to incorporate any regular and overtime rates but merely took into consideration hourly rates previously paid as one of many factors in the negotiations (R. 100–101). Thus one of respondent's witnesses testified that the monthly salary was a mere approximation, not "exactly mathematically time and a half; it was a question of negotiation, with a lot of other things that were put in" (R. 100–101). That the salary actually agreed upon did not purport to embody an hourly rate is implicit in the district court's finding that the amount of the salary was more than the employees would have earned at their hourly rate (R. 150).[3]

In February 1941 when Page and Spooner were first put on a salary basis, their monthly salaries were $185 and $180, respectively, Stegman's was $190. When this suit was instituted the salaries

[3] Actual computation will demonstrate that the salary was in fact less. See note 8, *infra*. The significance of the finding, however, lies in its recognition that there was not an exact translation of the hourly rates into the salary.

of Page and Spooner had been increased to $210 per month, Stegman's to $205 per month (R. 145–147). Although the record indicates that the hourly rate of 80 cents was one of the factors in negotiating the original salaries of Page and Spooner, there is no suggestion in the record that any hourly rate was considered in connection with their subsequent salary increases or in connection with determining Stegman's salary at any time.

The circuit court of appeals held that respondent had not violated the overtime requirements of the Act. Its ruling was based upon the hypothesis, for which it found support in the evidence summarized above, that the monthly salaries of the engineers included compensation at 80 cents an hour for 40 hours and at one and one-half times that rate for hours worked in excess of 40 for a scheduled workweek of 51 hours (R. 164).

REASONS FOR GRANTING THE WRIT

The holding of the court below that a salary could be interpreted to include overtime compensation, notwithstanding the failure of the contract to provide hourly or overtime rates, is in direct conflict with this Court's decisions in *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, and *Floyd* v. *DuBois Soap Co.*, 317 U. S. 596, and should, we submit, be reversed on the authority of those cases. In the *Missel* case this Court held that an employee who received a weekly salary for a variable number of hours in excess of the statutory

maximum had not received overtime compensation under the Act. In the *Floyd* case the same conclusion was reached with respect to employees who worked a fixed rather than a variable number of hours. These decisions require the same result in the instant case where respondent's employees were paid a salary for hours in excess of the statutory maximum without receiving additional compensation for overtime hours.

In finding compliance with the overtime requirements of the Act, notwithstanding respondent's admission that it was proceeding on the premise that the engineers were not entitled to overtime compensation (R. 101), the court below assumed that the salary was calculated to include an allowance for statutory overtime based upon the prior 80-cent hourly rate (R. 164). We shall show that this asumption cannot be squared with either the findings of the district court or the record. But even if the salary were so calculated, the decision is nevertheless inconsistent with *Overnight Motor Co. v. Missel, supra.* Other circuit courts of appeals have relied upon the *Missel* case in consistently holding that, notwithstanding an intention to have the salary include overtime compensation, a contract for a workweek longer than the statutory maximum, which does not specify hourly rates, violates the overtime requirements of the Act. *Walling* v. *Stone,* 131 F. 2d 461, 463 (C. C. A. 7); *Walling* v. *Helmerich &*

Payne, 138 F. 2d 705, 707 (C. C. A. 10);[4] *Patsy Oil & Gas Co.* v. *Roberts,* 132 F. 2d 826 (C. C. A. 10); *Watkins* v. *Hudson Coal Co.,* 151 F. 2d 311 (C. C. A. 3), certiorari denied, No. 703, October Term, 1945, February 4, 1946; see also *Seneca Coal & Coke Co.* v. *Lofton,* 136 F. 2d 359, 362 (C. C. A. 10), certiorari denied, 320 U. S. 772; *Adams* v. *Union Dime Savings Bank,* 144 F. 2d 290 (C. C. A. 2), certiorari denied, 323 U. S. 751. The specification of hourly rates in the contract involved in *Walling* v. *Belo Corp.,* 316 U. S. 624, was expressly referred to in *Overnight Motor Co.* v. *Missel, supra,* at 581, as distinguishing the two cases.[5] It is clear, therefore, that the *Missel* rule must govern where the contract provides only for a salary.

The contracts here not only failed to specify an hourly rate, but could not have been based upon the rate which the court below assumed was employed. The court of appeals stated that "the pay was figured in a shift from hourly pay to monthly salary, at 80 cents an hour" (R. 164). But at the time of the shift to salaries in February 1941 each of the three engineers was paid a

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[4] This issue was not before this Court in its review of the case, 323 U. S. 37, as the circuit court of appeals decided this aspect of the case favorably to the Administrator, and the Company did not seek review.

[5] Accordingly, the decision below is erroneous under the doctrine of the *Missel* case, regardless of the outcome of *Walling* v. *Halliburton Oil Co.,* No. 74, this Term, in which the present vitality of the *Belo* decision is involved.

different monthly salary.[6] Since the court below assumed the same workweek for all employees, the same hourly rate could not have been used to arrive at three different salaries. Moreover, Stegman was paid on a salary basis at the time of the "shift" and has been so paid at least since 1939.[7] Thus the hypothesis of the court's ruling could in no event be acceptable as applied to Stegman. And its applicability to the other two engineers is also difficult to reconcile with the undisputed evidence in the record as to how their salaries were fixed. Respondent's own witness testified that the monthly salary was not "exactly mathematically time and a half; it was a question of negotiation, with a lot of other things that were put in" (R. 100–101). The monthly salary payable, based on the theory and figures employed by the Circuit Court of Appeals, would have been $195.87.[8] The salaries actually paid were $180 (Spooner) and $185 (Page).[9] Moreover, an

[6] Page received $185; Spooner, $180; and Stegman, $190 (R. 145–147).

[7] Although the other engineers had their pay changed from an hourly rate to a monthly salary on February 1, 1941, Stegman's salary remained unchanged from November 1939 to March 1942 (R. 147). During this period the statutory workweek after which overtime compensation had to be paid changed from 42 to 40 hours.

[8] ($0.80×40 hours) + $1.20×11 hours) = $45.20 per week ($45.20×52 weeks) ÷ 12 months = $195.87 per month.

[9] A raise to $195 in August 1941 was not for the purpose of mathematically adjusting the salary to meet the requirements of the old hourly rates but was the result of negotiations with the union (R. 103, 108).

intention to fix the salaries so as to comply with the Act is doubtful because the company admittedly was going on the premise that the engineers were "exempt employees * * * and that under the law they were not entitled to time and a half" (R. 101). Thus, it is clear that at the time referred to in the opinion of the court below the contract of employment was based upon a salary alone without provision for overtime compensation. The case would seem, therefore, to be clearly governed by *Overnight Motor Co.* v. *Missel, supra,* where the Court's opinion stressed the fact that "there was no contractual limit upon the hours which petitioner [the employer] could have required respondent [the employee] to work for the agreed wage * * * and no provision for additional pay in the event the hours worked required minimum compensation greater than the fixed wage" (p. 581). As the Court stated, "Implication cannot mend a contract so deficient in complying with the law" (p. 581).

Moreover, the salaries paid *at the time of suit* were completely unrelated to the rate adopted by the court below. The district court found that Stegman was paid a salary and that Page and Spooner received salaries with "no compensation for overtime in addition to his salary" except overtime at straight-time rates for hours worked in excess of 46 per week (R. 145–147). At the time of suit two engineers were paid salaries of $210 per month and one $205 (R. 145–147). Application of the hourly rate of 80 cents

assumed by the court would have equalled $195.87 per month on the basis of a 51-hour week[10] and $169.87 per month on the basis of a 46-hour week.[11] The discrepancy between these amounts and the salaries of $210 and $205 actually paid is the clearest evidence that the salaries did not purport to be predicated upon the assumed hourly rate. In the absence of a specific contract provision, this discrepancy obviously cannot be allocated to overtime. *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427. As succinctly stated in the concurring opinion of Mr. Justice Frankfurter: "It should not be left to courts to work out a hypothetical mathematical interpretation which, if it corresponded with the actual arrangement, could satisfy the statute" (p. 434.[12]

The record not only fails to disclose any rate upon which a theory of compliance with the Act's overtime requirements may be premised, but, on the contrary, affirmatively establishes that no such rate was employed. As we have seen, the district court found that at the time of suit two engineers received salaries and "straight-time

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[10] See note 8, supra.

[11] ($0.80×40 hours) + ($1.20×6 hours) = $39.20 per week ($39.20×52 weeks) ÷ 12 months = $169.87 per month.

[12] Since it is clear that the 80-cent rate was not in fact employed in determining the employees' compensation, it should be pointed out that it would not establish the regular rate even if actually specified. *Walling* v. *Helmerich & Payne*, 323 U. S. 37; *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427; *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419.

overtime pay for hours worked in excess of 46 hours per week, up to a maximum of 53 hours per week" (R. 146–147). The straight-time rates were obtained by dividing the weekly salary by 46.[13] This finding of salary and overtime rates in the absence of other pertinent findings clearly implies that other rates were not employed. Thus, it must be assumed that the salary provided compensation at the regular rate for hours up to 46, that the overtime arrangement provided compensation at the same rate for hours in excess of 46, and that overtime at the statutory rate of one and one-half times the regular rate was not paid for any of the hours worked in excess of 40. The "hypothetical mathematical interpretation" that the salary included overtime compensation does not correspond, therefore, to the actual arrangement evidenced by the record. And even if the salary did include overtime compensation for the hours up to 46, there is no color of compliance for the hours over 46 for which admittedly only straight time was paid (R. 117, 118, 120, 129, 146–147).

CONCLUSION

If the decision below should stand, the opportunities for evasion of the overtime pay provisions of the Fair Labor Standards Act would be immeasurably enlarged. In view of the importance of vacating so clearly erroneous a precedent,

[13] See note 2, *supra*.

as well as the plain conflict with the decisions of this Court in the *Missel* and *Floyd* cases, it is respectfully submitted that this petition be granted and the judgment of the court below be reversed without further argument on the merits. It may be noted that a similar procedure was followed in the *Floyd* case; 317 U. S. 596.

J. HOWARD MCGRATH,
Solicitor General.

WILLIAM S. TYSON,
Solicitor,
United States Department of Labor.

OCTOBER 1946.

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